

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ADAM CASTANEDA,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2004

No. 249702

Ottawa Circuit Court

LC No. 02-026436-FC

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals by right from a jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for which he was sentenced as an habitual offender, third offense, MCL 769.11, to 126 to 240 months in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that he was denied his right to a fair trial when a police officer testified that defendant had invoked his right to remain silent during questioning. Whether the issue is one of admission of evidence or prosecutorial misconduct, it has not been preserved because defendant did not object below. Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

"The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial." *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). "A defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses his postarrest, post-Miranda warning silence for impeachment or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events." *People v Solomonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004).

There is nothing in the transcript to indicate that at the time of the conversation in issue defendant was in custody or that he had been advised of his *Miranda*<sup>1</sup> rights. “[W]here a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant’s silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant’s Fifth Amendment privilege.” *Id.* at 665. The police officer testified that when he sought to question defendant during his investigation, defendant stated that he had consulted an attorney and would not answer certain questions. Whether defendant did not want to answer certain questions because the attorney had advised him of his Fifth Amendment rights or because of other reasons is not known.

We note also from the context in which the officer’s testimony was offered that it appears that the prosecutor did not “attempt[ ] to directly inject the defendant’s silence into the defendant’s trial” but “inadvertently elicited testimony” about defendant’s refusal to answer certain questions while seeking other information. *People v Dennis*, 464 Mich 567, 577; 628 NW2d 502 (2001). The fact that defendant had refused to answer certain questions was never mentioned again and thus the prosecutor made no effort to use defendant’s silence against him. *Id.* at 581. Where there is “no specific inquiry by the prosecution regarding defendant’s silence” and no “attempt to use that silence for impeachment purposes,” the defendant’s constitutional rights are not violated. *Id.* at 580. Under the circumstances, we find that defendant has not established plain error warranting relief.

We affirm.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).